

JUDGE ALAN D. ALBRIGHT

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

BRANDON BERNARD,

*Defendant.*

NO. 6:99-CR-00070-ADA-2

**THIS IS A CAPITAL CASE****EXECUTION CURRENTLY SET  
FOR DECEMBER 10, 2020**MOTION TO ENJOIN THE  
GOVERNMENT FROM  
EXECUTING BRANDON  
BERNARD UNTIL APPEALS ARE  
COMPLETE**I. MOTION**

Before the government scheduled Mr. Bernard's execution, Mr. Bernard had sought to vacate his death sentence because the government hid *Brady* evidence throughout the trial and collateral review process. This court deemed the procedural aspect of the claim compelling, but not supported by Fifth Circuit precedent. This issue is still being litigated. Despite the ongoing litigation, the Attorney General directed the Bureau of Prisons to set a date to execute Mr. Bernard. The Attorney General's action in setting that date is contrary to the controlling statute, 18 U.S.C. § 3596(a), which dictates that no such date may be set until Mr. Bernard has exhausted his appeals of this Court's ruling. As set forth more fully below, the government effectively conceded this point in *United States v. Christopher Vialva*.

1 The Attorney General set the execution date during a brief window of  
 2 time when this Court's docket incorrectly suggested that all appellate review  
 3 in Mr. Bernard's case was complete. The Attorney General may therefore  
 4 have acted believing that all appellate proceedings had in fact been  
 5 completed. Whatever the case, the government scheduled Mr. Bernard's  
 6 execution when it lacked any statutory authority to do so. The government  
 7 must therefore be enjoined from proceeding with Mr. Bernard's execution  
 8 until all appellate review proceedings from this Court have concluded in due  
 9 course. If necessary, the Court should also enjoin the government from  
 10 setting any new execution date unless and until all appellate review of this  
 11 Court's ruling is complete.

## 12 II. PROCEDURAL BACKGROUND

### 13 A. Trial and Subsequent Discovery of *Brady* 14 Violation

15 In 2000, Brandon Bernard was tried for three capital crimes arising  
 16 from the deaths of Todd and Stacie Bagley. Despite his being saddled with  
 17 court-appointed attorneys who did little for him, the jurors spared his life on  
 18 two of the three capital counts. In contrast, the jury sentenced Christopher  
 19 Vialva – the individual the government has conceded was the ringleader of  
 20 the offense – to death for all three capital counts. Mr. Vialva was executed on  
 21 September 24, 2020.

22 In 2018, Mr. Bernard's post-conviction counsel discovered that the  
 23 government had long been suppressing expert opinion testimony that directly  
 24 contradicted the theory on which it had urged the trial jurors to sentence Mr.  
 25 Bernard to death. Specifically, before Mr. Bernard's trial the government had  
 26 consulted with gang expert Sgt. Sandra Hunt, who told the trial prosecutors

1 that in the hierarchy of the gang to which all the defendants charged in this  
 2 case were alleged to belong, Mr. Bernard had occupied the very lowest  
 3 position, far below either Mr. Sparks or Mr. Vialva. That Mr. Bernard  
 4 teetered on the very periphery of the gang flatly contradicted the  
 5 government's predictions of future dangerousness, which rested on the claim  
 6 that Bernard yearned to be a "top dog" in the gang and thus would inevitably  
 7 behave violently in prison if not sentenced to death.

8 The government's dire predictions of dangerousness have proven false,<sup>1</sup>  
 9 but that is no solace for Mr. Bernard, who faces execution on December 10.  
 10 That fate looms because the government –not simply throughout trial, but  
 11 throughout the pendency of the entire collateral review process – failed to  
 12 disclose Sgt. Hunt's exculpatory expert opinion. And the government kept  
 13 silent about her expert opinion even as it falsely assured the Court that it  
 14

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15 <sup>1</sup> Contrary to the government's arguments for death, Mr. Bernard has  
 16 avoided any gang involvement and has been a model prisoner. In connection  
 17 with Mr. Bernard's recently submitted Clemency Petition (attached as  
 18 Exhibit 1), Mark Bezy, a former warden at the very institution where Mr.  
 19 Bernard is now incarcerated, reviewed Mr. Bernard's BOP file. Mr. Bezy  
 20 noted that Mr. Bernard has been allowed to work as an orderly, which reflects  
 21 prison officials' confidence in his trustworthiness and good behavior, and that  
 22 Mr. Bernard remarkably had not incurred a single disciplinary infraction  
 23 during his time in the BOP (then 16 years). *See* Exhibit 1, Clemency Petition  
 24 at 20-26; *id.* at 205-206 (Declaration of Warden Mark Bezy (Ret'd) at 2  
 25 (August 20, 2016)). In fact, beyond simply staying out of trouble, Mr. Bernard  
 26 has used his time constructively, counseling other youth not to be led astray.  
 Exhibit 1, Clemency Petition at 51-55; *id.* at 320-329 (Declarations of David  
 and Michael Boyd and accompanying magazine article documenting Mr.  
 Bernard's good works while in prison). As Mr. Bernard's Clemency Petition  
 demonstrates, there are plentiful reasons to commute his death sentence under  
 principles of simple fairness. While those reasons do not bear directly on the  
 legal question before the Court, they nevertheless show that the relief Mr.  
 Bernard requests is not only legally correct but will yield a just result.

1 had shared all such evidence through a purported “open file” discovery  
2 process that in fact did not meaningfully exist.

3 The government never disclosed Sgt. Hunt’s opinion to anyone  
4 representing Mr. Bernard at any time. Mr. Bernard’s current attorneys  
5 discovered it themselves by scouring the record of Tony Sparks’ 2018  
6 resentencing. The government used Sgt. Hunt’s opinions for Mr. Sparks’  
7 resentencing because those opinions supported its view that Mr. Sparks’  
8 position within the gang justified a harsh sentence. During that resentencing,  
9 Sgt. Hunt explicitly noted that fifteen-year-old Tony Sparks in 1999 occupied  
10 a position of power, far above Mr. Bernard’s lowly position in the gang. Judge  
11 Yeakel found Sgt. Hunt’s opinions compelling and cited them as a basis for  
12 delivering Mr. Sparks a lengthy sentence. But the corollary to Judge Yeakel’s  
13 conclusions about Mr. Sparks is that Sgt. Hunt’s expert opinion that *Mr.*  
14 *Bernard* sat at the gang’s very *lowest* level – far below both Mr. Vialva and  
15 Mr. Sparks – constitutes powerful mitigating evidence that Mr. Bernard’s  
16 trial attorneys could have put to good use, if only the government had not  
17 suppressed it. Her expert opinion supports a finding that Mr. Bernard poses  
18 no threat of future dangerousness and was less culpable for the crimes  
19 against the Bagleys. Had the government not suppressed this evidence and  
20 had it instead been presented to the jury, that jury would no doubt have  
21 spared Mr. Bernard’s life on all three counts.<sup>2</sup>

22  
23  
24 <sup>2</sup> This is not speculation. A majority of the surviving jurors have declared that  
25 they no longer believe a death sentence necessary given Mr. Bernard’s lesser  
26 role in the crime, four of them urging outright that his death sentence be  
commuted. The presiding juror is praying that the President spares Mr.  
Bernard’s life, and three other jurors have expressed similar views. Exhibit  
1, Clemency Petition at 8-9, 29-31, 68-70 (Exhibits B and C to Clemency

**B. Mr. Bernard Filed a Second-In-Time § 2255 Petition Based on the *Brady* and *Napue* Violations, Which This Court Labeled as Procedurally “Compelling.” The Fifth Circuit Denied That Appeal, But the Appellate Process is Ongoing.**

Upon discovering this long-suppressed evidence, Mr. Bernard filed a motion before this Court contending, *inter alia*, that he should be allowed to litigate its impact on his sole death sentence.<sup>3</sup> Specifically, Mr. Bernard argued that the government had violated *Brady*<sup>4</sup> and *Napue*<sup>5</sup> by unconstitutionally suppressing Sgt. Hunt’s expert opinion and misleading the jury about the true facts of Mr. Bernard’s relationship to the gang. He maintained that this motion could not be construed as a successive petition, because governmental misconduct had prevented him from discovering the information in time to include the claim in his original § 2255 proceeding. He rested this theory on the Supreme Court case of *Panetti v. Quarterman*,<sup>6</sup> the broad reservoir of equitable power available to the Court under Rule 60, and the constitutional promise that the writ of habeas corpus will never be suspended. *See* dkt. 661 at 35-60. This Court found the procedural argument “compelling,” but foreclosed by precedent. *See Order on Relief from Judgment* at 4, dkt. 664 (August 8, 2019). The Court ultimately transferred the motion

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Petition), 77-78 (Exhibit E to Clemency Petition) and 206 (Exhibit L to Clemency Petition).

<sup>3</sup> Motion for Relief from Judgment, dkt. 661 (February 4, 2019).

<sup>4</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>5</sup> *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

<sup>6</sup> 551 U.S. 930 (2007).

1 to the Fifth Circuit; Mr. Bernard appealed the transfer order, and on Sept. 9  
 2 the Fifth Circuit denied his appeal in an unpublished decision without  
 3 addressing the merits of his *Brady* and *Napue* claims. *United States v.*  
 4 *Bernard*, 820 F. App'x 309 (5th Cir. 2020).

5 **C. Mr. Bernard's Execution Date Was Set During**  
 6 **an Interval When This Court's Docket**  
 7 **Incorrectly Reflected That All Appeals Taken**  
 8 **from This Court Had Been Concluded.**

9 On October 14, this Court dismissed Mr. Bernard's motion, apparently  
 10 mistakenly believing that a mandate had issued and that all appellate  
 11 avenues of relief had been exhausted. Judgment, dkt. 697. The time for filing  
 12 for en banc consideration of the Fifth Circuit's ruling, however, had not yet  
 13 run. Mr. Bernard's counsel emailed the Court explaining that it believed that  
 14 the Court's dismissal was improvidently entered, given that the window had  
 15 not yet closed for seeking en banc reconsideration, and that Mr. Bernard  
 16 intended to seek such reconsideration of the important legal questions  
 17 presented. *See* Exhibit 2, Email from Robert C. Owen to Austin Schnell  
 18 (October 16, 2020). Hours later, the government, at a time when the docket  
 19 still erroneously reflected that all collateral review proceedings had  
 20 concluded, filed notice of its intent to execute Mr. Bernard fifty-five days  
 21 later, on December 10. Dkt. 698.

22 On the next court day – Monday, October 19 – the Court vacated its  
 23 dismissal order, noting that no mandate had yet been issued by the Fifth  
 24 Circuit. Dkt. 699. On Friday, October 23, Mr. Bernard filed for en banc review  
 25 of the Fifth Circuit's denial of his appeal. Two weeks later, on Friday,  
 26 November 6, 2020, the Fifth Circuit denied en banc review of the issue that  
 this Court declared to be “compelling.” Mr. Bernard will now seek certiorari

to the United States Supreme Court to review the Fifth Circuit's judgment, since the Fifth Circuit has decided an important federal question in a way that conflicts with *Panetti*.<sup>7</sup> His due date for filing that petition is April 5, 2021.<sup>8</sup>

### III. ARGUMENT

#### A. The Argument That Bernard's *Brady* and *Napue* Claims Should Not Be Barred from Consideration On Procedural Grounds Remains Compelling, and the Supreme Court Should Be Given an Opportunity to Consider It.

As this Court has recognized, Brandon Bernard made a compelling argument that he should be allowed to litigate his *Brady* claim: namely, the impact on his sentence of favorable evidence that the government unconstitutionally hid throughout his trial and his collateral review process. *See* Order, dkt. 664 at 4. At least one federal appellate panel and several concurring and dissenting judges from sister courts share the view that Bernard has advanced in his earlier motion, dkt. 661 – that under a straightforward reading of the Supreme Court's decision in *Panetti*, his motion must be allowed to proceed. *See Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018) (unanimously reaching that conclusion, but finding itself bound to accept a prior panel's contrary conclusion); *Long v. Hooks*, 972 F.3d 442, 486 (4th Cir. 2020) (en banc) (Wynn, Thacker, and Harris, JJ.,

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<sup>7</sup> *See* Sup. Ct. R. 10(c).

<sup>8</sup> Until further notice, because of the pandemic, the Supreme Court has extended the time for filing a petition of certiorari from 90 to 150 days from the lower court's final judgment. *See* Supreme Court Order List: 589 U.S. (March 19, 2020); Sup. Ct. R. 13.

concurring) (calling, in light of *Scott*, for Fourth Circuit to reconsider its precedent that treats petitions raising such claims as successive); *Allen v. Mitchell*, 757 Fed. Appx. 482 (6th Cir. 2018) at \*4 (Moore, J. dissenting) (“[T]reating Allen’s *Brady* claim as second or successive would incentivize state prosecutors to withhold materially exculpatory evidence until after a petitioner exhausts his initial federal habeas claims; . . . foreclosing adjudication unnecessarily restricts federal habeas review of *Brady* violations.”).

As the cited opinions in *Scott*, *Long*, and *Allen* show, the subject of Mr. Bernard’s ongoing appellate litigation undoubtedly presents an important federal question. Ruling against Mr. Bernard would not only allow the government to carry out a death sentence that it could not have obtained if it had played by the rules, but would incentivize other prosecutors to do what the prosecutors here did – suppress critical *Brady* evidence throughout the trial and the initial collateral review process, so as to deny a defendant any procedural vehicle to remedy the government’s misconduct. It is no secret that in recent years a troubling number of *Brady* violations by the Department of Justice have come to light. The problem is so wide-ranging and acute that Congress unanimously passed and President Trump recently signed the Due Process Protection Act, legislation that compels all federal courts to remind government attorneys that complying with *Brady* is not an option, but an obligation.<sup>9</sup>

In a death penalty case such as this, the need for Mr. Bernard to be afforded these fundamental due process protections could hardly be greater.

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<sup>9</sup> See Pub. L. No. 116-182 (2020); Fed. R. Crim. P. 5(f).

1 The government violated those basic constitutional guarantees throughout  
 2 his trial and concealed those violations throughout his original § 2255 review  
 3 process. There should be a remedy, and in seeking that remedy Bernard  
 4 should be afforded the same appellate review rights as any other litigant,  
 5 which includes the opportunity to seek review under the rules and procedures  
 6 that apply to all cases. *See, e.g., Purkey v. United States*, 964 F.3d 603, 618  
 7 (7th Cir.) (“[T]he public interest is surely served by treating this case with  
 8 the same time for consideration and deliberation that we would give any case.  
 9 Just because the death penalty is involved is no reason to take shortcuts—  
 10 indeed, it is a reason not to do so.”), *reconsideration denied*, 812 F. App’x 380  
 11 (7th Cir. 2020), and *cert. denied*, No. (20A12), 2020 WL 4006838 (U.S. July  
 12 16, 2020). Indeed, the emerging division of judicial views on the issue in this  
 13 case, see *Scott, Long, Allen, supra*, may become better formed by the time the  
 14 Supreme Court considers Mr. Bernard’s petition for certiorari. Thankfully, as  
 15 we explain below, the governing statute guarantees that Bernard be afforded  
 16 the same appellate review rights as everyone else, and that those rights will  
 17 not be diminished by the setting of an execution date.

18 **IV. 18 U.S.C. § 3596 PROHIBITS THE SETTING OF AN**  
 19 **EXECUTION DATE AT THIS TIME, GIVEN THE**  
 20 **PREEXISTING LITIGATION AND ONGOING**  
 21 **APPELLATE PROCESS.**

22 Congress has dictated that the Attorney General must retain custody  
 23 of a death-sentenced federal prisoner “until exhaustion of the procedures for  
 24 appeal of the judgment of conviction and for review of the sentence.” 18 U.S.C.  
 25 § 3596(a). This language of “exhaustion of the procedures for appeal ... and  
 26 for review of the sentence” must necessarily include substantial collateral  
 review proceedings that originate from the sentencing court.

1 It is hardly a controversial position that a death-sentenced prisoner  
 2 must be entitled to one full round of § 2255 litigation. That full round, of  
 3 course, necessarily includes the consideration of all non-successive § 2255  
 4 petitions. A contrary rule in this case would deprive Bernard – and any  
 5 similarly situated litigant – of a full and fair consideration of *Brady* claims  
 6 that undercut a sentence of death and that were unavailable earlier due to  
 7 government misconduct. Such a rule would not only be perverse – since it  
 8 would both reward and incentivize government misconduct – but it would  
 9 also effectively divest from the Great Writ the ability to prevent the execution  
 10 of unconstitutionally secured death sentences. In turn, this would render a  
 11 capital litigant’s ability to meaningfully challenge his death sentence under  
 12 § 2555 into a hollow exercise.

13 The Supreme Court must be allowed to have the final word as to  
 14 whether Mr. Bernard’s motion can rightly be barred on successive-petition  
 15 grounds, even though governmental misconduct prevented him from  
 16 advancing his *Brady* and *Napue* claims earlier. And it must be allowed to  
 17 have that final word before any execution date is set. *See* 18 U.S.C. § 3596(a).  
 18 The government has effectively admitted this truth in a case it argued before  
 19 this Court a little more than two months ago.

20 In *United States v. Christopher Vialva*, the government implicitly  
 21 conceded that Mr. Bernard is entitled to complete the appellate processes  
 22 related to his *Brady/Napue* motion before the Attorney General moves to  
 23 execute him.<sup>10</sup> For example, in argument before the Court on September 3,

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24  
 25 <sup>10</sup> This Court’s ultimate conclusion that the government had not run afoul of  
 26 the law in setting Mr. Vialva’s execution date (dkt. 690) does not require the  
 same result here. Mr. Vialva, unlike Mr. Bernard, was not in a statutorily  
 protected procedural posture when the government scheduled his execution:

1 the Government acknowledged that a death-sentenced defendant must be  
 2 afforded the opportunity to exhaust “all of his collateral review” proceedings  
 3 before the Attorney General may set an execution date. Transcript of  
 4 September 3, 2020 hearing (AUSA: “The only other requirement is that Mr.  
 5 Vialva be able to exhaust *all of his appeals* and *all of his collateral review*  
 6 before a date has been sent, and he has done that.” (emphasis added)  
 7 (transcript attached as Exhibit 3)). The government’s briefing makes similar  
 8 concessions. *See* Government’s Response to Motion to Enjoin the Bureau of  
 9 Prisons and U.S. Marshals Service from Executing Defendant, dkt. 680 at 10,  
 10 *United States v. Vialva*, No. W-99-CR-0070(1)-ADA (August 25, 2020)  
 11 (“Rather, as the judgment recognizes, an appeal would freeze Vialva’s death  
 12 sentence, and BOP’s authority to schedule and proceed with the execution  
 13 would thereafter be constrained by the statutory requirement of ‘exhaustion  
 14 of the procedures for appeal of the judgment of conviction and for review of  
 15 the sentence,’ 18 U.S.C. § 3596(a) . . .”); *id.* at 6 (“Nothing in the judgment  
 16 suggests that those time limits also constrain the Attorney General’s exercise  
 17 of his discretion to set Vialva’s execution date *after all avenues* for appeal and  
 18 post-conviction review are exhausted.” (emphasis in original as to “after,”  
 19 emphasis added for “all avenues”)).

20  
 21  
 22 Mr. Vialva had no pending post-conviction proceeding pending, let alone one  
 23 that stemmed from proceedings originating from this very Court. Mr. Vialva  
 24 thus could not, and did not, advance the statutory argument presented here.  
 25 Nevertheless, the government in *Vialva* repeatedly conceded the key point –  
 26 namely, that the Attorney General lacks statutory authority to set an  
 execution date until a death-sentenced prisoner has exhausted appellate  
 review proceedings of the district court’s sentence.

Here, unlike in *Vialva*, the Court is presented with a prisoner who has not “exhausted all of his appeals” and “all of his collateral review.” As noted, Mr. Bernard’s petition for certiorari to the Supreme Court falls due on April 5, 2021. No execution date may legally be set until the Supreme Court either grants review and conclusively determines that question or denies review. Only the occurrence of one of those two contingencies will “exhaust[] ... the procedures ... for review of the sentence” and vest the Attorney General with the authority to set a date to execute Mr. Bernard. *See* 18 U.S.C. § 3596(a).<sup>11</sup>

## V. THE EXECUTION DATE ALSO CONTRAVENES THE TERMS OF THE JUDGMENT

The Attorney General’s setting of an execution date in this case also offends this Court’s judgment, which contains wording similar to the statutory language of 18 U.S.C. § 3596(a), obligating the Bureau of Prisons to retain custody of Mr. Bernard “until exhaustion of the procedures for appeal of the judgment of conviction and review of the sentences.” Judgment

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<sup>11</sup> As noted above, in choosing to schedule Mr. Bernard for execution the government may have inferred from events on this Court’s docket that the Court had received the Fifth Circuit’s mandate from its denial of Mr. Bernard’s appeal of this Court’s August 2019 transfer order, and thus that appellate proceedings were at an end. While that inference would have been factually mistaken (no mandate had yet issued from the Fifth Circuit), the issuance of the Fifth Circuit’s mandate will not conclude the appellate proceedings on Mr. Bernard’s *Brady* and *Napue* claims in any event. The fact that a mandate has issued from a federal Court of Appeals does not affect the jurisdiction of the Supreme Court to entertain a petition for certiorari seeking review of the lower court’s judgment, or to grant that petition and reverse the decision below. *United States v. Perez*, 110 F.3d 265, 266 (5th Cir. 1997) (“The Supreme Court does not lose jurisdiction because the mandate of the court of appeals has issued”) (citing, *inter alia*, *Aetna Casualty & Surety Co., et al., v. Flowers*, 330 U.S. 464, 467 (1947) (“Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court’s jurisdiction”) (citations omitted)).

1 at 2, dkt. 290.<sup>12</sup> The judgment by its terms bars any execution until the  
 2 “exhaustion of appeals.” *Id.* For the reasons explained above, those appeals  
 3 have not been exhausted. While this issue is straightforward, the Court  
 4 should, if any clarification is needed, expressly declare that the stay  
 5 contemplated by the judgment remains in full effect until the Supreme Court  
 6 issues a definitive ruling on the compelling issue identified here.

7 Like Mr. Bernard’s statutory arguments, this issue differs from the  
 8 contentions that Mr. Vialva raised about the judgment, and which this Court  
 9 rejected. Mr. Vialva contended that, *even with his appeal and collateral*  
 10

11 <sup>12</sup> The relevant portion of the judgment provides:

12  
 13 As to Counts SS1, SS2, and SS3, the defendant is sentenced to LIFE  
 14 without the possibility of release. As to Count SS4, the defendant is  
 15 hereby committed to the custody of the U.S. Bureau of Prisons until  
 16 exhaustion of the procedures for appeal of the judgment of  
 17 conviction and review of the sentences. Upon exhaustion of appeals,  
 18 the sentence of DEATH will be implemented by the defendant being  
 19 released from the custody of the U. S. Bureau of Prisons to the  
 20 custody of the United States Marshals, who shall supervise the  
 21 execution of the defendant in the manner prescribed by the laws of  
 22 Texas.

23  
 24 The time, place and manner of execution are to be determined by  
 25 the Attorney General, provided the time shall not be sooner than 61  
 26 days nor later than 90 days after the date of this judgment. If an  
 appeal is taken from this conviction and sentence, execution of the  
 sentence shall be stayed pending further order of this Court upon  
 receipt of the mandate of the Court of Appeals.

27  
 28 The defendant is hereby committed to the custody of the Bureau of  
 Prisons and shall be confined until the sentence of execution is  
 carried out.

Judgment at 2, dkt. 290.

1 *attack completed*, the stay mentioned in the judgment remained in effect.<sup>13</sup>  
 2 He also maintained that the Attorney General could not set a date after 90  
 3 days had elapsed from the Judgment.<sup>14</sup> Mr. Bernard does not raise either of  
 4 these arguments.

5 **VI. THE COURT SHOULD ENJOIN THE GOVERNMENT**  
 6 **FROM SETTING ANOTHER UNLAWFUL EXECUTION**  
 7 **DATE.**

8 Given the statutory language that outlaws the setting of any execution  
 9 date in this case while Mr. Bernard's current appeal process is ongoing, as  
 10 well as the government's past concessions on the issue, one would hope that  
 11 the government would concede that it erred in scheduling Mr. Bernard's  
 12 execution, withdraw the date and forego setting another until the Supreme  
 13 Court has considered Mr. Bernard's forthcoming petition for certiorari.  
 14 Because it may not, Mr. Bernard asks the Court explicitly to enjoin such  
 15 conduct.

16 A preliminary injunction should be issued when the movant establishes  
 17 "(1) whether the stay applicant has made a strong showing that he is likely  
 18 to succeed on the merits; (2) whether the applicant will be irreparably injured  
 19 absent a stay; (3) whether issuance of the stay will substantially injure the  
 20 other parties interested in the proceeding; and (4) where the public interest  
 21 lies." *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (quoting *Nken v.*  
 22 *Holder*, 556 U.S. 418, 434 (2009)).

23 Here, given the preexisting and ongoing litigation, the statute plainly  
 24 does not presently vest the Attorney General with power to set an execution

25 <sup>13</sup> See *Vialva Motion* at 3 (dkt. 675).

26 <sup>14</sup> *Id.* at 8-10.

1 date for Mr. Bernard. 18 U.S.C. § 3596(a). Mr. Bernard thus has convincingly  
 2 demonstrated that he will prevail on the merits of this motion. And obviously  
 3 he stands to suffer irreparable harm if the government sets and carries out  
 4 an execution contrary to the protections of § 3596(a). His unlawful death  
 5 would outweigh any interest the government could claim in rushing to  
 6 execute him in a manner that offends congressional directives. Indeed,  
 7 allowing the government to unlawfully proceed would harm the public  
 8 interest, as it would undermine the public's respect for the law. That would  
 9 surely be the effect of allowing the Attorney General to execute Mr. Bernard  
 10 before he is afforded the due process provided by statute and by the appellate  
 11 review processes routinely made available to all other litigants. And as noted  
 12 by the *Purkey* court, *supra*, "the public interest is surely served by treating  
 13 this case with the same time for consideration and deliberation that we would  
 14 give any case." 964 F.3d at 618.

## 15 **VII. CONCLUSION**

16 The Court should enjoin the government from executing Mr. Bernard  
 17 until the Supreme Court either decides the underlying procedural issue on  
 18 the merits or declines to hear the case.

## 19 **VIII. CERTIFICATE OF CONFERENCE**

20 Assistant United States Attorneys Joseph Gay, Jr., Mark Frazier, and  
 21 Mike Hardy have been advised of the relief requested in this motion on  
 22 today's date. Counsel does not know the government's position.  
 23  
 24  
 25  
 26

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all registered parties.

I further certify that I mailed one copy of the foregoing document to Defendant Brandon Bernard via U.S. mail.

s/ Amy Strickling, Paralegal  
Federal Public Defender Office